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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LORD ELECTRIC COMPANY, INC.,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

In the District Court, petitioner, an electrical contracting company, and others were convicted of a bid-rigging conspiracy in violation of Section 1 of the Sherman Act.

To prove the interstate commerce element of its case, the government at trial showed only that out of state supplies were purchased for use on the electrical contracting projects that were the objects of the alleged conspiracy. Defendants, on the other hand, affirmatively proved at trial that the alleged conspiracy did not affect the price, volume or type of such out of state supplies.

The Third Circuit held that the "in commerce" and the "effect on commerce" tests of the Sherman Act were satisfied because the government proved that out of state supplies were used and because the alleged conspiracy produced a "shift" in the identity of the local purchaser of these out of state supplies.

Accordingly, this petition raises the following important questions of federal law which should be decided by this Court:

1. On an issue on which the lower courts are in disarray, must the government, to prove an "effect on commerce" in a Sherman Act criminal prosecution, demonstrate an effect on either the price, volume or type of goods shipped in interstate commerce—or is it sufficient merely for the government to demonstrate that the alleged conspiracy resulted in a "shift" in the identity of the local purchaser of such out of state goods?

2. Does the Third Circuit's decision that the "in commerce" test of the Sherman Act is satisfied merely by proof of the purchase of out of state supplies conflict with *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), other decisions of this Court, and decisions of the other circuits?

PARTIES TO THE PROCEEDING

There were six parties to this case in the Third Circuit Court of Appeals that are not listed in the caption of this petition:

Fischbach and Moore, Inc.;

Sargent Electric Company;

Joseph J. Rodgers;

Paul E. Arbogast;

Frederic B. Sargent; and

Ralph D. Vryenhoek.*

Following conviction, defendants Sargent Electric Company, Frederic B. Sargent and Ralph D. Vryenhoek petitioned the Third Circuit for rehearing *en banc*, which petition was denied on January 4, 1985. Defendant Joseph J. Rodgers also petitioned the Third Circuit for rehearing *en banc*, which petition was denied on January 14, 1985. Defendant Fischbach and Moore, Inc. obtained a stay of the Court of Appeals' mandate pending application for a writ of certiorari on December 21, 1984. Defendant Paul E. Arbogast obtained a stay of the Court of Appeals' mandate on January 8, 1985. Defendants Sargent Electric Co., Frederic B. Sargent and Ralph D. Vryenhoek obtained a stay of the Court of Appeals' mandate on January 16, 1985. Defendant Joseph J. Rodgers filed a motion to stay the mandate of the Court of Appeals pending application for a writ of certiorari on January 18, 1985.

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* There were four additional defendants in the original criminal action: E.C. Ernst Co., The Howard P. Foley Co., Tri-City Electric Company, Inc. and James L. Oesterle. The district court accepted a plea of *nolo contendere* from E.C. Ernst Co. and a plea of guilty from The Howard P. Foley Co. prior to trial. The district court granted motions for judgment of acquittal made by Tri-City Electric Company, Inc. and James L. Oesterle. None of these parties was an appellant in the Third Circuit proceeding.

It is contemplated that separate petitions for certiorari will be filed by Fischbach and Moore, Inc.; Sargent Electric Co., Frederic B. Sargent and Ralph D. Vryenhoek; Joseph J. Rodgers; and Paul E. Arbogast.*

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* Petitioner Lord Electric Company, Inc. has one subsidiary that is not wholly owned: Lord Electric Company of Puerto Rico, Inc. Petitioner itself is a wholly owned subsidiary of LECO Enterprises, Inc. To counsel's knowledge, LECO Enterprises, Inc. has no publicly-held subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Lord Electric Company, Inc. respectfully asks that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit, entered on December 10, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is annexed as Appendix A. The transcript of the bench opinion of the District Court on the interstate commerce issue is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals (Appendix C) was entered on December 10, 1984. The Court of Appeals stayed its mandate pursuant to Federal Rule of Appellate Procedure

41(b) on January 8, 1985 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal."

STATEMENT OF THE CASE

The Petitioner: Petitioner Lord Electric Company, Inc. ("Lord") is an electrical contracting company. Its headquarters are in New York City, but it has regional offices throughout the country. Through these regional offices, Lord provides the expertise of electrical engineers and the labor services necessary to install wiring and related electrical equipment in commercial building projects.

Between 1974 and 1981, Lord's Pittsburgh office bid for and was awarded a number of electrical contracting jobs for work at the Western Pennsylvania Works (the "Western Works") of the United States Steel Corporation ("USS").

The Crime Charged: On July 1, 1983, Lord and five other electrical contractors, together with five individual employees, were indicted for conspiring to allocate electrical construction projects at the Western Works, to fix the prices at which the projects were bid, and to submit collusive, noncompetitive, and rigged bids, all in violation of Section 1 of the Sherman Act. Jurisdiction was based on 18 U.S.C. § 3231. Lord, two other companies and four individuals stood trial and were convicted. The corporate defendants, including petitioner, were each sentenced to pay the maximum fine under the Sherman Act—$1 million.

The Trial: The government's case at trial consisted mainly of evidence to prove the existence of the conspiracy alleged in the indictment.

However, since Lord's position at trial was that the provision of electrical contracting services to USS at the Western Works was a purely local activity beyond the scope of the Sherman Act, the government was also put to its proof on the interstate commerce element of its case.

In an effort to meet its burden on the interstate commerce issue, the government established only the following: USS sold its finished products produced at the Western Works to customers across the United States; USS purchased materials from out of state suppliers in connection with its capital projects at the Western Works, including the electrical contracting aspects of those projects; and the defendant contractors purchased materials from out of state in connection with the electrical contracting work they performed at the Western Works.

Thus, the government's case showed no more than a limited interstate aspect to the capital projects at the Western Works. The government did not prove, however, that the flow of goods in interstate commerce would have been diminished, increased or affected in any way by the alleged conspiracy. Indeed, the evidence offered at trial by defendants demonstrated quite the contrary—for example, defendants proved that USS's purchase of materials from out of state suppliers were generally made in advance of, and without knowledge of, which electrical contractor would be the successful bidder on a particular project. Those purchases would not have been affected in any way by the alleged conspiracy. Defendants' evidence further demonstrated that their own purchases of supplies from out of state were unaffected by any collusive arrangements that may have existed among them—a "shift" in the identity of the local purchaser would have had no impact on the volume and types of out of state supplies ordered and prices paid.

Apart from the purchase of materials from out of state suppliers, there is no dispute in the trial record that the

electrical contracting services rendered by Lord and the other defendants were purely local in character: the invitations to bid the Western Works jobs were sent to the defendant contractors in Pittsburgh from USS's Pittsburgh office; engineers and other employees of the contractors prepared estimates of cost and price in Pittsburgh and submitted the bids directly to the USS Pittsburgh office; all the laborers that worked on the Western Works jobs were hired by the defendant contractors from the local Pennsylvania union halls; and all the electrical contracting work on the Western Works projects was performed entirely in Pennsylvania.

Based on these facts, Lord moved at the close of the government's case-in-chief and again at the close of the evidence for a judgment of acquittal on the ground that the government had failed to prove the interstate commerce element of its Sherman Act case. Both motions were denied.

The Third Circuit's Decision: The Third Circuit affirmed the conviction of all defendants. On the interstate commerce issue, the court found that the defendants' contracting services were "in commerce" and that the bid-rigging conspiracy "affected commerce."

The contracting services were "in commerce," the court held, because both USS and the defendants ordered supplies from out of state in connection with Western Works projects. Because "the materials were shipped into the state solely in connection with the contracting jobs, and were otherwise useless," the court concluded that "the contracting services were an essential, integral part of interstate commerce" and thus "in commerce." (App. A at 15.) The court relied on no other facts to support its conclusion and, indeed, there were none in the record.

The alleged conspiracy "affected" commerce, the court said, "by shifting [interstate] purchases from one contractor to another." (App. A at 15.) However, in reviewing the district judge's instruction on the interstate commerce issue, the court

found no error in a charge that "the jury need only find that the commerce involved was substantial"—and need not also find that there was a "shift" in interstate commerce. (App. A at 23.)

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to review the decision below because the lower courts are in disarray with respect to an important question of federal law: what is the limit, if any, to the reach of the Sherman Act to regulate essentially local commercial activities?

This Court has clearly established that the Sherman Act extends to activities either that are "in interstate commerce" or that, while wholly local in nature, have a substantial effect on interstate commerce. *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 241 (1980); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 743-47 (1976). It is equally clear, however, that the Sherman Act does not extend to *every* local activity that has some connection, no matter how attenuated, with the purchase or sale of interstate goods and services. The activity "infected" by an alleged anticompetitive practice must be shown, at a minimum, to have a substantial effect on the interstate commerce involved. *McLain*, 444 U.S. at 241-43.

Here, the proof at trial affirmatively demonstrated that the defendants' electrical contracting services were a purely local activity and that the conspiracy alleged had no effect on the price, volume or types of interstate goods used in connection with the contracting services. The Third Circuit nevertheless held that the defendants' contracting services fell within the reach of the Sherman Act under both the "in commerce" and "effect on commerce" tests.

The Third Circuit's holding on the "in commerce" issue is in direct conflict with the decisions of this Court and those of the other circuits and should be corrected.

In ruling on the "effect on commerce" test, the Third Circuit read *McLain* to mean that the reach of the Sherman Act is almost without limit—that the interstate commerce element is satisfied as long as there is some connection—regardless of how attenuated—between the activity "infected" by the alleged restraint and interstate commerce. On this issue, the decision below threatens, for all practical purposes, to eliminate completely the interstate commerce element of a Sherman Act offense.

The Third Circuit is not alone in its reading of *McLain*: the Sixth Circuit has also adopted an expansive interpretation of that case and its predecessor, *Rex Hospital*. The Ninth Circuit has gone even further, holding that the interstate commerce element of the Sherman Act is now satisfied if *any* of a defendant's business activities affect interstate commerce, even if those activities are unrelated to the alleged Sherman Act violation.

On the other side, decisions in the First, Second and Tenth Circuits have rejected the Ninth Circuit's expansive view, while decisions in other circuits have continued to hold that local activities with only an attenuated or incidental relationship to interstate commerce remain outside the scope of the Sherman Act.

In short, the lower courts have been unable to apply the teaching of *McLain* and *Rex Hospital* in a consistent manner. In an area where the need for uniformity is self-evident, the courts of appeals have been unable to agree. The confusion and conflict in the lower courts on this issue present the paradigm for granting certiorari under this Court's Rule 17.

This major criminal antitrust case, which arises on a full factual record after trial, is an opportunity for this Court to correct the erroneous decision below, to clarify its decisions in *McLain* and *Rex Hospital*, and to eliminate the confusion in the lower courts on a central issue in the administration of the federal antitrust laws.

I

On an Issue on Which the Lower Courts are in Disarray, the Third Circuit Erroneously Found an "Effect on Commerce" When the Evidence Affirmatively Showed No Effect on the Price, Volume or Type of Interstate Goods Involved

This Court addressed the scope of the "effect on commerce" test under the Sherman Act in two recent cases, *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232 (1980), and *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976). In both cases, this Court counseled the lower courts to examine whether the activity that is "infected" by the alleged anticompetitive practice, even if wholly local in nature, has a substantial effect on interstate commerce. In both *McLain* and *Rex Hospital*, this Court reversed lower court decisions that had dismissed Sherman Act complaints because the interstate commerce allegations were insufficient.

While *Rex Hospital* and *McLain* stand as warnings to the lower courts to refrain from dismissing a Sherman Act complaint which properly *alleges* the requisite effect on interstate commerce, these cases do not eliminate the requirement of *demonstrating* that effect at trial. *McLain*, 444 U.S. at 242, 245-46; *Rex Hospital*, 425 U.S. at 747 n.5. Moreover, this Court made clear in *Rex Hospital* and *McLain* that the effect that must be demonstrated is a change in the overall price, volume or makeup of the goods and services flowing in the relevant interstate market.

In *Rex Hospital*, for example, a hospital company alleged that, as a result of the anticompetitive actions of the defendants, the planned expansion of its hospital facilities would be thwarted. The plaintiff also alleged that substantial amounts of its supplies and revenues and a number of its patients came from out of state. If the defendants' anticompetitive plan were to succeed, the plaintiff argued, these out of state transactions would be adversely affected. This Court held these allegations

to be sufficient to satisfy the "effect on commerce" test at the pleading stage, noting that "if [defendants] were to succeed in blocking [plaintiff's] planned expansion, [plaintiff's] purchases of out-of-state medicines and supplies as well as its revenues from out-of-state insurance companies would be thousands and perhaps hundreds of thousands of dollars less than they would otherwise be." *Rex Hospital*, 425 U.S. at 744. The "effect on commerce" on which this Court relied in *Rex Hospital* was thus a substantial change in the volume of commerce in the relevant interstate market.

In *McLain*, this Court again suggested that the type of "effect" that will satisfy the interstate commerce element of the Sherman Act is a change in the volume or terms of the relevant interstate transaction. *McLain* addressed the issue of whether a complaint alleging a price-fixing conspiracy by local real estate brokers met the "effect on commerce" test under the Sherman Act. This Court held the interstate commerce allegations of the complaint to be sufficient to establish jurisdiction at the pleading stage because it was likely that the price-fixing agreement alleged would substantially affect the volume and terms of interstate real estate transactions:

> It is clear, as the record shows, that the function of respondent real estate brokers is to bring the buyer and seller together on agreeable terms. For this service the broker charges a fee generally calculated as a percentage of the sale price. *Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce.*

McLain, 444 U.S. at 246 (emphasis added).

Both *McLain* and *Rex Hospital* thus make clear that the interstate commerce element of the Sherman Act requires that

the activity infected by the alleged restraint "stimulate or retard" the interstate flow or result in a change in the volume, type, makeup or price of the interstate goods or services involved.

The Third Circuit's ruling below ignores the teaching of *Rex Hospital* and *McLain* on this issue. The decision below held that the mere purchase of out of state goods by USS and the defendant electrical contractors in connection with the Western Works projects was sufficient to satisfy the "effect on commerce" test of the Sherman Act.

The Third Circuit's reasoning is based on a single fact: as a result of the alleged conspiracy, the identity of the local contractor awarded a particular job "shifted" among the contractors, depending on which one was selected to submit the low bid. (App. A at 15.) Citing to *McLain* and its own decision in *Cardio-Medical Associates, Ltd.* v. *Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983), the court below concluded that, because the local contractors purchased materials from out of state, this "shift" "would have a marked effect on interstate commerce." (App. A at 14-15.)

The Third Circuit did not point to a change in the price of the interstate materials ordered (either up *or* down), a change in the types or volume of such materials, or a change in the identity of the out of state companies that supplied the materials. The record evidence was that no such changes would have occurred because of the alleged conspiracy.

The Third Circuit then compounded its error by simply presuming that interstate commerce was affected by this shift from one local contractor to another. Because the conspiracy shifted purchases of out of state supplies from one local contractor to another—an *intra*state shift—the Court simply speculated that "[*p*]*er se* violations in the electrical contracting field involving USS *would have* a marked effect on interstate commerce." (App. A at 15; emphasis added.)

The Third Circuit's ruling in this case thus ignores the type of interstate commerce effect required in a Sherman Act case,

as well as the evidentiary showing necessary to prove that effect. In these respects, the decision below goes far beyond what we submit was intended by this Court in *McLain* and *Rex Hospital*. If allowed to stand, the Third Circuit's decision will signal a dramatic expansion in the scope of the Sherman Act.

The Third Circuit's liberal reading of the "effect on commerce" requirement is not limited to this case. In decision after decision, the Third Circuit has interpreted *McLain* and *Rex Hospital* as implicitly overruling established Third Circuit law as well as the law in other circuits in favor of a greatly expanded view of the reach of the Sherman Act. *E.g.*, *J.P. Mascaro & Sons* v. *William J. O'Hara, Inc.*, 565 F.2d 264, 266-68 (3d Cir. 1977); *Harold Friedman Inc.* v. *Thorofare Markets Inc.*, 587 F.2d 127, 133 & n.15 (3d Cir. 1978); *Evans* v. *S.S. Kresge Co.*, 544 F.2d 1184, 1188-90 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *see Cardio-Medical Associates, Ltd.* v. *Crozer-Chester Medical Center*, 721 F.2d 68, 72-75 (3d Cir. 1983).

Courts in the other circuits are divided and confused as to the proper application of the "effect on commerce" test in light of *McLain* and *Rex Hospital*. The Sixth Circuit, for example, like the Third Circuit here, held in a Sherman Act case that a shift of business from one local contractor to another "affected" interstate commerce, even though the price and amount of materials flowing in interstate commerce in connection with the contractors' work remained exactly the same. *James R. Snyder Co.* v. *Associated General Contractors*, 677 F.2d 1111, 1113-15 (6th Cir.), *cert. denied*, 459 U.S. 1015 (1982).

The Ninth Circuit has gone even further in its interpretation of *Rex Hospital* and *McLain*, requiring only that a defendant's general business activities have some connection to interstate commerce, even if the interstate nexus is unrelated to the anticompetitive practice alleged. *Western Waste Service Systems* v. *Universal Waste Control*, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).

Yet the "general business activities" test adopted by the Ninth Circuit has been explicitly rejected by the First, Second and Tenth Circuits. *Cordova & Simonpietri Ins. Agency* v. *Chase Manhattan Bank*, 649 F.2d 36, 45 (1st Cir. 1981); *Furlong* v. *Long Island College Hospital*, 710 F.2d 922, 925-26 (2d Cir. 1983); *Crane* v. *Intermountain Health Care, Inc.*, 637 F.2d 715, 721-24 (10th Cir. 1981) (*en banc*).

And decisions in other circuits continue to view the "effect on commerce" test as requiring substantially more than a mere showing that the parties involved in the alleged anticompetitive practice purchased goods from out of state. For example, in *Heille* v. *City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982), decided after both *McLain* and *Rex Hospital*, the Eighth Circuit held that the purchase of out of state trucks and equipment to operate a local rubbish hauling service was insufficient to demonstrate an effect on interstate commerce. The Third Circuit held exactly the opposite in this case. And in *Dominion Parking Corp.* v. *Baltimore and Ohio R.R.*, 450 F. Supp. 441 (E.D. Va. 1978), decided after *Rex Hospital*, a district court in the Fourth Circuit held that an alleged anti-competitive boycott that shifted the purchase of out of state goods from one local buyer to another was insufficient to satisfy the "effect on commerce" element of a Sherman Act claim. The court found that even though the interstate purchases of a particular buyer might have been affected, the flow of interstate goods and the prices paid "remained substantially the same." *Id.*, at 446. The Third Circuit's ruling below was to the contrary.

Resolution of this confusion in the lower courts in the wake of *McLain* and *Rex Hospital* is necessary to a consistent application of the "effect on commerce" test. Identical business conduct across the country should not be within—or beyond—the reach of the Sherman Act depending upon the particular geographic location in which that conduct occurs.

The Third Circuit's ruling below expands the reach of the Sherman Act to all local commercial activities involving the

purchase of goods from out of state, even if the alleged restraint has no effect whatsoever on the interstate commerce market. This ruling should be corrected, and the confusion in the lower courts resolved.

II

The Third Circuit's Decision is in Direct Conflict With Decisions of This Court and Other Circuits That the Mere Use of Out of State Supplies Does Not Transform a Local Commercial Activity Into an Activity "In Interstate Commerce"

The "in commerce" test under the Sherman Act requires that the activity "infected" by the alleged anticompetitive practice be an "inseparable" and "integral" part of an interstate transaction. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *see McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 243-45 (1980). Activities that are fundamentally local in nature with only an incidental relationship to interstate commerce are not "in commerce" for purposes of the Sherman Act. *E.g.*, *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

The Third Circuit based its determination that the "infected" activity here was "in commerce" on two facts:

> (1) USS bought materials from out of state in connection with the Western Works jobs; and
>
> (2) the defendant contractors purchased materials from out of state for use in performing contracting work on the Western Works jobs.

These facts, standing alone, are insufficient to satisfy the "in commerce" test under the decisions of this Court and the other courts of appeals.

USS's Interstate Purchases Do Not Satisfy the "In Commerce" Requirement of the Sherman Act

This Court has made clear time and again that a company engaged in a local activity is not "in interstate commerce" merely because it provides services to a business that is itself within the flow of interstate commerce. In *Gulf Oil Corp.* v. *Copp. Paving Co.*, 419 U.S. 186 (1974), for example, this Court held that the supplying of materials to an interstate highway project by a local company does not place the local company's business in the flow of interstate commerce. If such a "formal nexus" were sufficient, this Court noted, the "in commerce" test would know no bounds—"the chain of connection [would have] no logical endpoint." *Id.*, at 198.

And again the same Term, in *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), this Court held that the fact that a company provides local labor services to a corporation engaged in interstate commerce does not place the local company's activities within the flow of interstate commerce. *Id.*, at 283.*

The Third Circuit's reliance on USS's out of state purchases on the "in commerce" issue directly conflicts with *Gulf Oil* and *Building Maintenance*.

Petitioner's Interstate Purchases Do Not Satisfy the "In Commerce" Requirement of the Sherman Act

The mere incidental purchase of out of state supplies in connection with a local activity is alone insufficient to place a local activity "in commerce" for purposes of the Sherman Act. This Court requires that the local activity also be shown,

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* Although *Gulf Oil* and *Building Maintenance* addressed the "in commerce" requirement in the context of the Clayton and Robinson-Patman Acts, 15 U.S.C. §§ 13(a), 14 and 18, the "in commerce" analysis under these statutes is the same as it is under the Sherman Act. *See McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 241-43 (1980); *J.P. Mascaro & Sons* v. *William J. O'Hara, Inc.*, 565 F.2d 264, 267 (3d Cir. 1977).

"as a matter of law or practical necessity," to be "inseparable" from and a "necessary" and "integral" part of a larger interstate transaction. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783-86 (1975); *see McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 243-45 (1980). In *Goldfarb*, for example, this Court found that the performance of a title search by local lawyers in connection with residential real estate transactions was "in commerce" because the residential real estate market was interstate in character and the title search was, in a practical sense, a necessary condition of completing the real estate transaction. *Goldfarb*, 421 U.S. at 783-86.

There is no evidence in this case—and the Third Circuit cites to none—that the purchase of out of state supplies was in any practical sense "inseparable" from the defendants' local electrical contracting services. Nor is there evidence that the local contracting services were a "necessary" or "integral" aspect of a larger interstate transaction, as were the legal services in *Goldfarb*. To the contrary, it was wholly irrelevant to completion of the projects at the Western Works whether the supplies were purchased locally or from out of state. The fact that the wire to be installed on a particular USS project happened to come from New York rather than Pennsylvania was completely fortuitous.

The decision below thus ignores the more demanding test set forth in *Goldfarb* and directly conflicts with decisions in the other circuits as well.

In *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964), for example, the Second Circuit held that a local bowling alley was not "in commerce" even though much of the equipment used to operate its business originated out of state. The out of state purchases were incidental to the defendants' main business, which was local in character. *Id.*, at 271-72. Similarly, the Ninth Circuit, in *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961), held that a local newspaper business was not "in commerce," even though it bought most of its supplies (newsprint, ink, etc.) from out of

state. Again, these purchases were incidental to defendants' main business, which was to print and distribute newspapers within a local area. *Accord, Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969).

The Third Circuit's decision illustrates a fundamental misconception of the boundaries of the "in commerce" requirement under the Sherman Act. The decision is in direct conflict with the decisions of this Court and those of other circuits and therefore warrants review.

CONCLUSION

We ask this Court to grant certiorari in order to resolve the important issues here raised concerning the scope of the interstate commerce requirement of the Sherman Act.

Dated: January 28, 1985
New York, New York

Respectfully submitted,

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Appendix A

Opinion of the Court of Appeals
[Officially Unreported]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3242, 84-3243, 84-3244, 84-3253,
84-3266, 84-3267, and 84-3268

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Sargent Electric Company,
Appellant in No. 84-3242

(D.C. Crim. No. 83-00098-04)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.

TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Frederic B. Sargent,
Appellant in No. 84-3243

(D.C. Crim. No. 83-00098-09)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Ralph D. Vryenhoek,
Appellant in No. 84-3244

(D.C. Crim. No. 83-00098-10)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY

LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Paul E. Arbogast,
Appellant in No. 84-3253

(D.C. Crim. No. 83-00098-08)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Joseph J. Rodgers,
Appellant in No. 84-3266

(D.C. Crim. No. 83-00098-07)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Lord Electric Company,
Appellant in No. 84-3267

(D.C. Crim. No. 83-00098-03)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Fischbach and Moore, Incorporated,
Appellant in No. 84-3268

(D.C. Crim. No. 83-00098-01)

Appeal from the United States District Court
for the Western District of Pennsylvania - Pittsburgh

Argued October 3, 1984

Before:

ALDISERT, *Chief Judge,*
HUNTER and WEIS, *Circuit Judges.*

(Filed December 10, 1984)

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OPINION OF THE COURT

ALDISERT, *Chief Judge*.

Three principal issues are presented in this appeal from sentences imposed on a guilty verdict in a criminal anti-trust prosecution: whether the proof at trial varied from the indict-

ment charging a single, continuing conspiracy; whether the government introduced sufficient evidence to prove the interstate commerce element of the Sherman Act violation; and whether this court should set aside or modify, on appeal, the one million dollar fine levied against defendant Fischbach & Moore. Appellants assert several less significant arguments, including the admission of an allegedly prejudicial government exhibit; prosecutorial misconduct during closing argument; errors in jury instructions; and the denial of a continuance to defendant Arbogast. Because we find no reversible error, we affirm the judgment of the district court.

I.

For approximately seven years, from 1974 to 1981, representatives of several electrical contracting companies met at the Duquesne Club in Pittsburgh. The purpose of these meetings was to allocate electrical construction projects, by bid rigging, at the Western Pennsylvania Works (Works) of United States Steel (USS). Whenever one of the companies desired to rig a bid, that company's representative would telephone the other contractors and arrange a meeting. After deciding among themselves which firm would receive the contract, that firm's representative would contact the other contractors and would tell them what bid to submit, ensuring that his firm's bid would be the lowest. Some of the firms kept track of the allocations to ensure that each contracting company received its fair share of work.

As a result of investigating this bid rigging scheme, the government accused a number of the electrical contractors and their employees of antitrust violations. The indictment charged them with violating § 1 of the Sherman Act by conspiring to allocate electrical construction projects at the Western Pennsylvania Works, to fix the prices at which those projects were bid, and to submit noncompetitive, collusive, and rigged bids on those projects. Although some of the defendants plea bargained to the charges and avoided trial, three electrical contracting companies, Fischbach & Moore (F&M), Sargent

Electric, and Lord Electric, and four individual employees, Paul Arbogast, Joseph Rodgers, Frederic Sargent, and Ralph Vryenhoek, stood trial on the charges. They are the appellants before us.

Prior to trial, one of the defendants, Paul Arbogast, was indicted and prosecuted in Montana for an unrelated Sherman Act violation. The district court postponed the Western Pennsylvania trial once because of the Montana action. In mid-January 1984, Arbogast again moved for a continuance, the Montana trial not having ended and the Western Pennsylvania trial scheduled to begin in early February. The court denied this motion. Arbogast was acquitted in Montana on January 21 and began trial in Pittsburgh on February 6.

To narrow the scope of the trial, the government issued a bill of particulars, which it later amended, identifying contracts within the scope of the conspiracy. The proof at trial related to some, but not all, of the contracts on this list. The government also introduced extensive evidence to prove the interstate commerce jurisdictional element. This evidence included Government Exhibit 32 (Govt. Ex. 32), a file of invoices and freight bills for electrical materials and equipment bought by USS from out of state vendors for use in electrical construction projects at the WPW.

After a finding of guilty by the jury, the district court imposed both fines and prison sentences on the individual defendants. The three corporate defendants received fines of one million dollars each, the statutory maximum under § 1 of the Sherman Act. Defendants now appeal their convictions, requiring this opinion to be more lengthy than what we believe to be appropriate in this court.

II.

Appellants raise three principal contentions. First, appellants F&M, Lord Electric, Sargent Electric, Paul Arbogast, and Joseph Rodgers allege a variance between the proof and the indictment. In a related argument, F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent allege that the govern-

ment did not prove the interstate commerce element of the Sherman Act charge. In the third major contention, F&M alleges both that its sentence was illegal and that the trial court abused its discretion in imposing sentence.

The precepts guiding our review of the variance argument are familiar. Our polestar is to determine whether "there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Palmeri*, 630 F.2d 192, 203 (3d Cir. 1980) (quoting *Burks v. United States*, 437 U.S. 1, 17 (1978)), *cert. denied*, 450 U.S. 967 (1981). Additionally, *Kotteakos v. United States*, 328 U.S. 750 (1946), sets forth the two-pronged test appellants must meet to succeed in this specific contention: (1) that there was a variance between the indictment and the proof and (2) that the variance prejudiced some substantial right of the defendants. *Id.* at 752, 756.

In the usual criminal case, our review of a sentence imposed by the district court is extremely circumscribed. *United States v. Felder*, 706 F.2d 135, 137 (3d Cir. 1983).[1] Generally, if the sentence falls within the statutory maximum, the matter is not reviewable on appeal. *United States v. Dickens*, 695 F.2d 765, 782 n.26 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1792 (1983). We may review the sentence, however, if there is a showing of illegality or abuse of discretion. *United States v. Fessler*, 453 F.2d 953, 954 (3d Cir. 1972). We now consider appellants' variance argument.

III.

Appellants F&M, Lord Electric, and Sargent Electric argue that because the government's evidence sought to establish multiple conspiracies and not the single, continuing conspiracy charged in the indictment, the convictions must fall as illegal. They allege variance in two respects: (1) that the government

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1. *But see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 213(a), 98 Stat. 1837, _____ (1984)(to be codified at 18 U.S.C. § 3742(a))(effective Nov. 1, 1986)(will allow review of sentences under limited circumstances after Act's effective date).

interpreted the indictment to charge that *all* electrical contracting bids were rigged during the time of the conspiracy, later reducing the number of bids in the bill of particulars and further reducing them at trial and (2) that the government proved not one continuing conspiracy, but a series of independent conspiracies, *i.e.*, that each contract the government proved the defendants rigged constituted a separate conspiracy.

A.

The indictment charged that the defendants conspired to "allocate among themselves electrical construction projects" at the Works; to "fix the prices at which electrical construction projects" were bid; and to "submit noncompetitive, collusive, complementary and rigged bids." App. at 21a-22a. But the indictment did not state that the conspiracy encompassed all bids or all contracts made during the seven-year period. Although the government so stated at a pre-trial conference, even if the appellants relied on these government representations or the bill of particulars as to the extent of proof, neither can modify the scope of the indictment. *United States v. Critchley*, 353 F.2d 358, 362 (3d Cir. 1965) (bill of particulars).

Even had the indictment read in terms of "all construction projects" and "all bids," the government still would have introduced sufficient evidence to prove the crimes charged. To prove a conspiracy to rig all bids, the government was not required to show that the defendants actually rigged all bids. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). The defendants could have conspired to rig all bids, but failed to achieve that objective for one reason or another, e.g. because the bid lists included companies with which the defendants could not cooperate. Evidence of the fourteen rigged bids both proved that a conspiracy to rig bids existed and permitted the jury to conclude that the conspiracy encompassed all bids.

B.

We also conclude that the government introduced sufficient evidence to justify a jury finding of only a single conspiracy.

The government proved that the defendants met, over a period of several years, at the Duquesne Club for the sole purpose of rigging bids and allocating contracts. The government introduced evidence to prove that all the participants knew the purpose of the club meetings and that they met as a group, thus negating the argument that separate groups of the defendants were conspiring together, with the same goal, but with their actions unconnected. More important, the government showed that some of the defendants kept records of which company received which job, ensuring that each firm would receive its fair allotment of the contracts. This recordkeeping indicated a single conspiracy that continued over time, and not separate conspiracies involving only certain contracts.

Because we hold that defendants did not prove a variance between the proof and the indictment, we need not consider the prejudice prong of *Kotteakos*.

C.

In a related argument, appellant Arbogast maintains that the proof varied from the indictment in that the government proved one conspiracy, but that conspiracy had no effect on interstate commerce. As support for this contention, Arbogast expressly declines to rely on *Kotteakos*, conceding that he suffered no prejudice from the variance alleged. Instead, Arbogast relies on the language of the Sherman Act requiring the conspiracy to restrain "trade or commerce among the several States." 15 U.S.C. § 1.

As we understand his argument, he contends that the government proved a single agreement to rig bids only at the time one of the defendants would telephone the others to arrange a meeting. This agreement, Arbogast states, was harmless and restrained no trade. Rather, the ensuing agreements reached at the meetings restrained trade, but those fourteen separate agreements were not charged in the indictment. We decline to adopt this convoluted construction of the offense charged in the indictment.

The Arbogast argument starts to collapse when he concedes, as he does, that he conspired to fix bids when one of the other

conspirators made a telephone call. Because we cannot isolate the original telephone call with the subsequent action triggered by the call, the keystone of his argument falls out. These telephone calls and the meetings that followed were an integral part of the conspiracy to fix bids, to which he agreed. To view the conspiracy in terms of artificial separate and distinct phases would give no meaning to the agreement into which Arbogast entered and for which he was indicted. Had the defendants not contemplated making the telephone calls, no reason existed for them to agree to rig bids if the calls were made. Rather, the calls and Duquesne Club meetings constituted concerted activity to further the conspiracy to rig bids. As such, anticompetitive effects of these actions cannot be separated from the initial agreement to rig bids.

IV.

In a more particularized argument, defendant Rodgers contends that the government did not introduce evidence sufficient for the jury to find that he knowingly joined the continuing conspiracy charged in the indictment. He argues that he began to attend the Duquesne Club meetings only as a casual observer to protect the interest of his company Foley Electric and that his appearance was long after the other defendants entered into a conspiracy. To join a conspiracy, the government generally must prove two different types of intent: (1) the basic intent to agree, which is necessary to establish the existence of the conspiracy and (2) the more traditional intent to effectuate the object of the conspiracy. *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

In a situation very similar to that of Rodgers, in *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), defendants were convicted of a 26-year continuing conspiracy to fix the price of consumer bags. One defendant, Chase Bag, maintained that the government had introduced insufficient evidence to support its conviction,

arguing that its behavior was legitimate price followership. *Id.* at 448. We affirmed Chase Bag's conviction, basing our decision on, among other things, Chase Bag's adoption of an unpublished price list of a competitor, St. Regis. We stated:

> Had the St. Regis incident been the only evidence against Chase Bag, we might agree that the government's proof varied substantially from the indictment. We note, however, that Chase Bag's participation in various meetings where prices were discussed, its exchange of price information with competitors, and its parallel pricing policies, although perhaps innocent by themselves, are cast in a different light by [Chase Bag's] apparent agreement with [St. Regis] to fix prices.

Id. at 455.

Although the issue is close, we are persuaded that the government introduced sufficient evidence to demonstrate that Rodgers knowingly entered the continuing conspiracy. Although he joined the Duquesne Club meetings at a point far into the conspiracy, his purpose in going there was to obtain contracts (specifically the contract designated as Govt. Ex. 23) for his company, Foley Electric. After it was agreed that Foley was to be the low bidder on this contract, Rodgers arranged the bid submissions on this contract by telephoning the other companies and telling them what prices to bid. The most damning evidence against Rodgers was his alleged reason for wanting this particular contract: "because he had cooperated with other people at the meeting and he felt that he should be given some consideration." App. at 1826a-27a. Viewed in the light most favorable to the government, this remark evidences Rodgers's knowledge both of the continuing nature and goals of the conspiracy and his intent to join the conspiracy and further its objectives. Rodgers's actions only confirm his understanding of and familiarity with the conspiracy.

If the testimony pertaining to Govt. Ex. 23 was the only evidence on which the government relied, perhaps Rodgers

would have had a stronger case. See, e.g. the one-time only exception we suggested in *Continental Group*, 603 F.2d at 455. But here the government introduced evidence of Rodgers's involvement with another rigged contract, designated as Govt. Ex. 27. Although testimony was conflicting as to whether the contract was rigged over the phone or at a club meeting, viewed in the light most favorable to the government, the jury could have found that Rodgers also participated in rigging this contract. We therefore concluded that substantial evidence existed to tie Rodgers to the conspiracy.

We now turn to appellants' interstate commerce argument.

V.

Appellants F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent argue that the government did not prove the interstate commerce element of the Sherman Act charge.

Section 1 of the Sherman Act proscribes "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States . . . . " 15 U.S.C. § 1. The government may prove the connection of the restraint to interstate commerce under either of two independent theories. *McLain v. Real Estate Board of New Orleans Inc.*, 444 U.S. 232, 242 (1980). An "in commerce" theory requires that the government prove that (1) a substantial volume of interstate commerce is involved with the challenged activity and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects. *Id.* at 244. An "effect on commerce" theory, applies to primarily intrastate activity. The government must show that (1) a substantial amount of interstate commerce was involved and (2) the challenged activity has a "not insubstantial effect" on interstate commerce. *Id.* at 245-46; *see also Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983).

The government may prove the nexus between interstate commerce and the challenged activity through either the activities of the target of the antitrust violation or defendant's

activities. *Id.* at 74. Because the activities involved in this case, price-fixing and bid rigging, are *per se* violations, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) (price fixing); *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979) (bid rigging); *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) (bid rigging), the government is not required to prove any adverse impact on interstate commerce. *Northern Pacific*, 356 U.S. at 5.

Based on the trial testimony, we hold that the government introduced substantial evidence to support a jury finding that either the electrical contracting services were in commerce or that the defendants' activities affected interstate commerce. As to the in commerce theory, the government introduced evidence to show that the contractors and USS ordered substantial amounts of materials from out of state for use on the USS jobs. Not only pieces of equipment used in the Works jobs cost tens of thousands of dollars, but often showed that materials were shipped directly from out-of-state manufacturers to USS job sites. The electrical contracting services thus involved a substantial amount of interstate commerce. Because the materials were shipped into the state solely in connection with the contracting jobs, and were otherwise useless, the contracting services were an essential, integral part of interstate commerce.

Moreover, the evidence also serves to prove the interstate element of the Sherman Act by satisfying the affecting commerce theory. Clearly, a large amount of materials used in the contracting jobs traveled through interstate commerce. *Per se* violations in the electrical contracting field involving USS would have a marked effect on interstate commerce, especially by shifting purchases from one contractor to another.

We next consider F&M's argument pertaining to its sentence.

VI.

F&M alleges both that its sentence was illegal and that the judge abused his discretion in imposing sentence. The illegality argument is based on the theory that the one million dollar fine

is disproportionate, thus violating the eighth amendment. F&M contends that the judge abused his discretion by basing the fine on the one million dollar penalty accepted by another defendant, the Foley Company, as part of its plea bargain.

F&M relies on *Solem v. Helm*, ____ U.S. ____, (51 U.S.L.W. 5019, June 28, 1983), in arguing that its fine is disproportionate. The Supreme Court suggested three factors for a court to consider in reviewing a sentence for disproportionality: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. *Id.* at ____, 51 U.S.L.W. at 5023. Evaluating these factors, we hold that the district court's sentence was not disproportionate and thus not illegal.

F&M brazenly committed a grave crime. The jury found the company guilty of conspiring to commit *per se* violations of the Sherman Act in a series of meetings that obviously were illegal. Moreover, F&M was one of the ringleaders of that conspiracy. As to the sentences imposed in the same jurisdiction, the penalties levied on the other defendants in this case provide a good example. Every individual defendant received a fine *and* a prison sentence; all the corporate defendants received one million dollar fines. Thus, in comparison, F&M's fine does not appear severe. Moreover, in comparing the sentence with those received by defendants in other jurisdictions, F&M provided extensive statistics on the infrequency of the imposition of the maximum fine. These statistics, however, illustrate that defendants frequently are fined, and fined in large amounts. Although F&M's one million dollar fine is extensive, its amount was the expression of the Congress, not the judiciary. Accordingly, we hold that the fine is not disproportionate to the gravity of the offense, the public policy considerations implicated and the Congressional determinations.

F&M also contends that the district court abused its discretion by taking another defendant's punishment into account when fining F&M. F&M argues that because the judge gave no

reasons for the fine imposed, it is reasonable to believe that he relied on improper motives. This court does not require a judge to elucidate his sentencing rationale.[2] *United States v. Del Piano*, 593 F.2d 539, 540 (3d Cir.)(per curiam), *cert. denied*, 442 U.S. 944 (1979). Nor does F&M offer any evidence, other than the speculations of its excellent lawyers, of the judge's reliance on improper factors in the sentencing process. In short, "aside from characterizing [the fine] as excessive, defendant[ ] [has] presented no reason which would justify a conclusion that the sentence[ ] [was] anything other than the result of a proper exercise of judicial judgment." *Government of the Virgin Islands v. Rodriguez*, 423 F.2d 9, 11 (3d Cir. 1970). For the above reasons, we decline to set aside F&M's sentence.

VII.

We now consider defendants' remaining arguments in turn.

A.

Lord Electric contends that the district court should not have admitted Govt. Ex. 32, the file of purchase orders and invoices, because the exhibit was irrelevant. Additionally, it argues that even if Govt. Ex. 32 were relevant, the evidence was prejudicial and the trial judge should have excluded the exhibit pursuant to Rule 403, Federal Rules of Evidence. Because the initial relevancy decision implicates the the interpretation and application of legal precepts, our review is plenary. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 269 (3d Cir. 1983); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102-03 (3d Cir. 1981). The Rule 403 decision, however, is reviewed under an abuse of discretion standard. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 269-70.

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2. *But see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. ____, ____ (1984)(to be codified at 18 U.S.C. § 3553(c) (effective Nov. 1, 1986) (court will be required to "state in open court the reasons for its imposition of the particular sentence" after the Act's effective date).

For evidence to be admissible under Rule 402, it must be relevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, F.R. Evid. The Government sought to introduce exhibit 32 to prove the interstate commerce element of Sherman Act jurisdiction.

As noted earlier, and contrary to what defendant Lord asserts, the interstate commerce activities of the target of the antitrust violation, as well as the defendant, are relevant to a finding on the interstate commerce element. *Cardio-Medical Associates*, 721 F.2d at 74. Because this evidence tended to make the existence of the consequential fact of involvement with interstate commerce more probable than if the evidence were not available, Govt. Ex. 32 was relevant.

Yet even if evidence is relevant, the court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, F.R. Evid. The defendant argues that Govt. Ex. 32 was more prejudicial than probative because the jury could not identify which invoices and freight bills related to the contracts at issue. The jury thus could have believed that evidence of every purchase of materials in interstate commerce contained in the file was relevant to proving the interstate commerce element of the crime.

Contrary to what Lord asserts, the jury could tie interstate purchases to particular contracts, by matching a project number to a job number. Although the process might be time consuming and the correlation not always perfect, this procedure removed the prejudice about which defendant was concerned, and tilted the balance in favor of admissibility.

B.

Sargent Electric argues that it is entitled to a reversal because of allegedly improper remarks made by the prosecutor during

his closing argument. In evaluating the prosecutor's comments, our standard of review is "whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate defendant's due process rights." *United States v. Scarfo*, 685 F.2d 842, 849 (3d Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

Sargent isolates three instances of misconduct to substantiate its contention. It states that the prosecutor expressed his subjective feelings as to its guilt, yet identifies no page in the transcript where this occurred. The government points to one remark of the prosecutor's: "I submit to you that the defendants are guilty . . . on the facts and the evidence . . . ." App. at 3673a. By tying his remarks to evidence on the record, *United States v. Schartner*, 426 F.2d 470, 477 (3d Cir. 1970), the prosecutor's remarks were not prejudicial.

Likewise, defendant's claims regarding other comments are baseless. The statement by the prosecutor that "[w]hat I would like to do is summarize what I think the issues in the case are . . .," app. at 3610a, were merely a figure of speech, and not an injection of his personal feelings into the trial. The reference to Sargent Electric's financial reports, app. at 3651a, although the reports were not in evidence, was proper rebuttal to the defendant's assertion that it had made a complete financial disclosure to USS. *United States v. Somers*, 496 F.2d 723, 740 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974).

Sargent Electric makes one final related argument for reversal, arguing that the prosecutor's rebuttal was so lengthy—one and a half hours—and non-responsive as to amount to a second closing argument, permitting surrebuttal on the part of the defense. The judge had the discretion to limit the prosecutor's rebuttal and chose not to do so. In view of the complicated nature of the case, the rebuttal was not overly long. Considering all the circumstances of the case, neither the rebuttal argument nor the prosecutor's remarks in any way violated defendant's due process rights.

C.

Defendant Arbogast argues that the trial court should have granted his second request for a continuance because his Montana trial ended shortly before the Pittsburgh trial began. In reviewing the trial court's decision, an appellate court will reverse the lower court only if the judge abused his discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Paullet v. Howard*, 634 F.2d 117, 119 (3d Cir. 1980) (per curiam). The factors a court should consider when presented with a motion for a continuance include: the efficient administration of criminal justice; the accused's rights, including an adequate opportunity to prepare his defense; and the rights of other defendants whose trials are delayed because of the continuance. *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214-15 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

In this instance, the trial court did not abuse its discretion. The judge's denial of the second continuance neither abridged Arbogast's right to due process nor was insupportable in light of the circumstances of the case.

Arbogast's reasons for seeking the continuance included giving him more time to prepare his defense and permitting him to be defended by counsel of his choice. Although this case is a fairly complex antitrust suit, Arbogast was aware of the general perimeters of the case against him when the district court first postponed the trial in October. Moreover, Arbogast discussed his defense for the Pittsburgh case with counsel during the Montana trial. Although Arbogast's first choice as counsel did not represent him in Pittsburgh, another lawyer from the same firm took over the representation. Despite these circumstances, Arbogast had approximately two weeks to devote to his Pittsburgh defense. Courts have found no constitutional violation in appointment of counsel cases when the defendant and his attorney have had much less time to prepare. *Ungar*, 376 U.S. 575 (five days to answer show cause order); *United States ex rel. Chambers v. Maroney*, 408 F.2d 1186 (3d Cir. 1969)(counsel appointed on day of trial).

Additionally, the judge already had continued the trial once, for a period of several months. To have postponed this complicated trial again would not only have contributed to calendar congestion, but, more important, would have made the other defendants involved continue to wait to have their day in court.

D.

Sargent Electric, Lord Electric, Frederic Sargent, and Ralph Vryenhoek argue that the judge erred in giving instructions: (1) by shifting the burden of proof to the defendants by an instruction that price-fixing is *per se* illegal; (2) by failing to charge the jury fully on sham bidding; (3) by his instruction removing the element of intent from the jury's consideration; and (4) by his instruction on the "affecting commerce" theory pertaining to the interstate commerce element of the Sherman Act.

In evaluating the district court's ruling on points for charge, the standard of review is abuse of discretion. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 199 (3d Cir. 1970). Once the court has given an instruction, we must "determine whether the charge, taken as a whole and viewed in light of the evidence, fairly and adequately submits the issues in the case to the jury." *Ayoub v. Spencer*, 550 F.2d 164, 167 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977); *see also United States v. Park*, 421 U.S. 658, 675 (1975). The trial court should be reversed only if the instruction was capable of confusing and thereby misleading the jury. *Idzojtic v. Pennsylvania Railroad Co.*, 431 F.2d 1029, 1036 (3d Cir. 1970) (Aldisert, J., dissenting). We now address defendants' contentions *seriatim*.

The Supreme Court repeatedly has held that *per se* violations require no proof of anticompetitive effect to constitute a violation of the Sherman Act. *Northern Pacific Railway*, 356 U.S. at 5; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-97 (1927). Consequently, an instruction to this

effect would "fairly and adequately" submit the issue to the jury. Moreover, this argument that the instruction creates an irrebuttable presumption has been considered and rejected by several jurisdictions. *See, e.g., United States v. Koppers Co.*, 652 F.2d 290, 293-96 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Manufacturers' Association of the Relocatable Building Industry*, 462 F.2d 49, 52 (9th Cir. 1972).

Sargent Electric argues that the court should have given a more complete instruction on sham bidding; it maintains that the instruction should have identified several aspects of USS's bidding procedures as potentially sham bidding and that the sham bidding instruction should have related to the rule of reason, rather than the *per se*, approach. The judge's instructions, however, adequately presented the issue to the jury.

The court initially referred to sham bidding in general terms. The court then instructed the jury that if USS acquiesced in the allocation of contracts, they should find the defendants not guilty. The court thus presented the essence of the sham bidding defense to the jury, although not in terms of specific practices. Moreover, Sargent Electric never requested the court to give the instruction in any particular language. Thus, the court's failure to adopt language other than that which it used is not reversible because the instruction did not represent "plain error resulting in a manifest denial of justice." *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980).

Additionally, no reason existed for the judge to couple the sham bidding instruction with a reasonableness instruction. Price-fixing and bid rigging are *per se* violations. Defendant's conduct, even if USS were a monopsonist as defendant contends, did not fall in any "gray zone" requiring a reasonableness instruction. *See United States v. Giller*, 599 F.2d 541 (3d Cir.), *cert. denied*, 444 U.S. 866 (1979). For the reasons stated above, the district court did not err in giving the challenged instruction.

Sargent Electric also alleges that the court's instructions removed consideration of the element of intent from the jury. The court instructed that no showing of specific intent to

disobey the law or restrain trade or knowledge of the illegality of the activities was necessary and defendants could be convicted if they knowingly formed the conspiracy or knowingly joined the conspiracy. App. at 3722a. Prior to this, the court also instructed that intent could be proved by showing that the acts of the defendants had the effect of bid rigging and the acts were undertaken with knowledge of the bid rigging; or defendants' acts did not have any proscribed effects, but the defendants undertook those acts with a conscious purpose of bringing about the proscribed effects. *Id.* at 3721a-22a.

The trial court's instructions avoided the problems of presuming intent simply from the commission of certain acts discussed in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Here, the jury was asked to find not only that the defendants knowingly joined or formed the conspiracy, but that they also meant to bring about or did bring about the effects proscribed by the Sherman Act. Moreover, not only did the instructions follow the language accepted by this court, especially as to specific intent, *see United States v. Continental Group, Inc.*, 603 F.2d 444, 462-63 (3d Cir. 1979), but part of the instructions followed the exact language of defendants' proposed instruction No. 14. App. at 3819a. Viewed as a whole, the instructions were a correct statement of the law and fairly and adequately presented this issue to the jury.

Appellants also object to the jury instructions pertaining to the "affecting commerce" theory because the judge stated that the jury need only find that the commerce involved was substantial and that they did not have to find a rise in prices or a shift in commerce and the judge instructed that the government could satisfy either the in commerce or affecting commerce theory to prove the interstate commerce element of the Sherman Act. The court's instructions, however, correctly stated the law. *Per se* violations require no proof of an anti-competitive effect on commerce. *Northern Pacific Railway*, 356 U.S. at 5. Also, evidence that supports either theory pertaining to the interstate commerce element is sufficient to

establish a Sherman Act violation. *McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

E.

Relying on *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), defendant Rodgers alleges prejudice because the district court failed to marshal the evidence against him. A trial court, however, need not marshal the evidence, especially if the trial is complex. *United States v. Gillilan*, 288 F.2d 796, 798-99 (2d Cir. 1961). Unlike *Kelly*, where the evidence did not connect the defendant to the single conspiracy charged, Rodgers suffered no prejudice by a failure to marshal the evidence because that evidence directly connected him to the conspiracy.

VIII.

We have carefully considered all contentions presented by the appellants. The judgment of the district court will be affirmed in all respects.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Order of the Court of Appeals
Amending Its Opinion, December 19, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3242, 84-3243, 84-3244, 84-3253,
84-3266, 84-3267, and 84-3268

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Appeal from the United States District Court
for the Western District of Pennsylvania - Pittsburgh

Argued October 3, 1984

Before:

ALDISERT, *Chief Judge,*
HUNTER and WEIS, *Circuit Judges.*

(Filed December 10, 1984)

ORDER AMENDING OPINION

It is hereby ordered that the opinion in the above, filed December 10, 1984, be amended as follows:

Page 10, lines 1 and 2: delete "Lord Electric, and Sargent Electric" and substitute "Sargent Electric, and Paul Arbogast"

Page 11, line 30: delete "Arbogast" and substitute "Lord Electric"

Page 12, line 1: delete "Arbogast" and substitute "Lord Electric"

Page 12, line 2: change "he" to "it"

Page 12, line 4: delete "Arbogast" and substitute "appellant"

Page 12, line 8: change "his" to "this"

Page 12, line 8: delete "Arbogast" and substitute "Lord Electric"

Page 12, line 12: delete "Arbogast" and substitute "appellant"

Page 12, line 18: delete "The Arbogast" and substitute "Lord Electric's"

Page 12, line 18: change "he" to "it"

Page 12, line 19: change "he" to "it" [twice]

Page 12, line 23: change "his" to "this"

Page 12, line 25: change "he" to "appellant"

Page 12, line 28: delete "Arbogast" and substitute "Lord Electric"

Page 12, line 29: change "he" to "it"

BY THE COURT

/s/ Ruggero J. Aldisert

Chief Judge

Dated: December 19, 1984

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix B

Bench Opinion of the District Court
on the Interstate Commerce Issue
[Officially Unreported: Transcribed at pp. 2075a-2080a
of the Joint Appendix on Appeal]

IN THE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENSYLVANIA

Crim. No. 83-98

UNITED STATES OF AMERICA

—v.—

FISCHBACH AND MOORE, INC.; THE HOWARD P. FOLEY COMPANY; LORD ELECTRIC COMPANY, INC.; SARGENT ELECTRIC COMPANY; E. C. ERNST, INC.; TRI-CITY ELECTRIC COMPANY, INC.; JOSEPH J. RODGERS; PAUL E. ARBOGAST; FREDERIC B. SARGENT; RALPH D. VRYENHOEK; and JAMES L. OESTERLE,

Defendants.

COHILL, *District Judge.*

There are two theories under which the interstate commerce element of the Sherman Act violation may be established. The "in commerce theory" and the "affecting commerce theory."

Courts in this circuit have taken a broad view of the Act's interstate commerce requirements. See Friedman against Thorofare Markets, 587 F2d 127, (3d Cir. 1978); Cardio Medical against Grozer Chester Medical Center, 721 F2d at 74, (3d Cir. 1983). And while these cases pertain to jurisdiction, the circuit has also taken a liberal view as to the proof of the substantive element. This I think is reflected in the opinion of Judge Rambo in the United States against H & M Inc., a

Middle District of Pennsylvania decision, found at 582 F. Sup. 651, Middle District of Pennsylvania, 1983; United States against Pennsylvania Refuse Association, 357 F2d 809, (3d Cir. 1966).

Both those decisions dealt with proof as to the interstate commerce question.

We feel that the Government has offered sufficient evidence regarding interstate commerce to present the question to a jury. First, we note that there is evidence that Defendants purchased supplies regarding United States Steel contracts from out of state. And while the Defendants cited us the Tenth Circuit case of Crane against Intermountain Health Care, 637 F2d 715-723, (10th Cir. 1981), we find the case of Lease Lights, Inc., against Public Service Company of Oklahoma, 701 F2d 794, (10th Cir. 1983), also on point. That opinion, a Section II Sherman Act case, dealt with the question of whether interstate commerce had been met where Defendants allegedly attempted to monopolize the market of installation of outdoor lighting equipment in a local area. And there the Court stated that where lights installed in the market area were purchased from out of state, where a portion of PSO's—which was the defendant—business—occurrs in interstate commerce, and, that some of the defendants' lighting customers were involved in interstate commerce, the question has been satisfied by the plaintiff.

And I will read an extensive passage from this case beginning at page—the citation is 701 F2d 794, beginning to read at 799 and reading on over to page 800.

> "Additionally, even at trial Dr. Mishler, M-i-s-h-l-e-r, is not required to show that the flow of interstate commerce is diminished; an unreasonable burden on commerce may exist even though the anticompetitive conduct may increase interstate commerce. Harold Friedman, Inc. v. Thorofare Markets, Inc. 587 F2d 127, (3d Cir. 1978); P. Marcus, Antitrust Law and Practice 86 (1980). 694 F2d at pp. 1227-1228."

And the Court goes on to say—that was quoting from Mishler versus St. Anthony's Hospital Systems. And then the Court goes on to say:

> "Applying these standards to the facts herein, we hold that appellants did establish a jurisdictional predicate for PSO's alleged antitrust violations and that the trial court erred in granting PSO's motion for a directed verdict. It was uncontested that the service in question, i.e., the supplying of illumination in and about the Tulsa metropolitan area, albeit admittedly local in nature, had a substantial impact on interstate commerce by the repeated, ongoing interstate purchase of lights and lighting components by both appellants and PSO. Having established a substantial effect on interstate commerce, appellants need not, as determined by the trial court, establish an adverse effect on interstate commerce."

I will then omit—I don't think it is necessarily important enough to read into the record, but I will just skip some, and then read on.

> "Although not conceded by PSO, appellants' evidence in this case did more than merely allege that PSO's general or overall business affects interstate commerce. As set forth, appellants presented unrebutted evidence that most of the lights and lighting components installed in the relevant market area were shipped into Oklahoma from other states. PSO did not challenge this evidence. It did not present evidence that the lights and lighting components it installed were not received in the course of interstate commerce. Under such circumstances, we need not presume the nexus between the challenged activity (PSO's outdoor lighting business) and interstate commerce (interstate shipment of lights and lighting components).
>
> "Contrary to PSO's contention, appellants' evidence was in keeping with Crane. We there held, citing to McLain, supra:
>
> > 'By stating that plaintiff need not make the more particularized showing of an effect on interstate commerce caused by the conspiracy or other aspects

> of respondents' activity that are alleged to be unlawful, the Court"—

and that was the Court in McLain—

> 'was only confirming the principle set forth in Hospital Building, Burke, (389 U.S. 320, 88 S. Ct. 443, 19 L.Ed.2d 554), and Goldfarb that for jurisdictional purposes a plaintiff need not make the particularized showing. 444 U.S. at 242, 100 S.Ct. at 509. In other words, an elaborate analysis of interstate impact is not necessary at the jurisdictional stage, only an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce.'

And, as noted, of course, this is a civil case. But I feel that it is applicable when viewed in light of the Rambo decision I previously mentioned, and I would also like to make a final reference on this aspect of our case, that the Supreme Court recently denied cert. in a case where the trial judge instructed the jury on the basis of far less proof than has been shown here. The name of that case was the U.S. against Basic Construction 711 F2d 570 in the Fourth Circuit, and cert. was denied there. And that is to be found in the December 5, 1983, issue of U.S. Law Week. The citation is 52 U.S.L.W. 3440.

So at this stage of the proceeding we are satisfied that the Government has proven a sufficient interstate commerce to put the question before the jury. And, of course, we will have, we hope, appropriate instructions for the jury with regard to that aspect of the case.

Appendix C

Judgment of the Court of Appeals,
December 10, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3242, 84-3243, 84-3244, 84-3253,
84-3266, 84-3267, and 84-3268

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Sargent Electric Company,
Appellant in No. 84-3242

(D.C. Crim. No. 83-00098-04)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.

TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Frederic B. Sargent,
Appellant in No. 84-3243

(D.C. Crim. No. 83-00098-09)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Ralph D. Vryenhoek,
Appellant in No. 84-3244

(D.C. Crim. No. 83-00098-10)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY

LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Paul E. Arbogast,
Appellant in No. 84-3253

(D.C. Crim. No. 83-00098-08)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Joseph J. Rodgers,
Appellant in No. 84-3266

(D.C. Crim. No. 83-00098-07)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Lord Electric Company,
Appellant in No. 84-3267

(D.C. Crim. No. 83-00098-03)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Fischbach and Moore, Incorporated,
Appellant in No. 84-3268

(D.C. Crim. No. 83-00098-01)

Appeal from the United States District Court
for the Western District of Pennsylvania - Pittsburgh

Present:

ALDISERT, *Chief Judge,*
HUNTER and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel October 3, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered April 19, 1983, in W.D. Pa. Crim. Nos. 83-98-08, 83-98-09 and 83-98-10, and entered April 20, 1983 in W.D. Pa. Crim. Nos. 83-98-04, 83-98-07, 83-98-03, and 83-98-01, appealed here respectively at Nos. 84-3253, 84-3243, 84-3244, 84-3242, 84-3266, 84-3267 and 84-3268 be, and the same are hereby affirmed. All the above in accordance with the opinion of this Court.

ATTEST:

_____
Clerk

December 10, 1984

Appendix D

Order of the Court of Appeals Staying the Court's Mandate, January 8, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3267

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC., et al.

Lord Electric Company,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 30, 1985.

/s/ Ruggero J. Aldisert
Chief Judge

Dated: January 8, 1985